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In the Supreme Court of the United States

HENRY TURNEY ..... *Appellant*

v. No. .....

STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Arkansas, which affirmed the conviction of the appellant for the crime of burglary and grand larceny obtained by the State of Arkansas in the Circuit Court of Lonoke County, Arkansas. The judgment of the Supreme Court of Arkansas became final on the 9th day of March, 1964, when appellant's petition for hearing was denied by that court. Appellant, after being found guilty, was sentenced to serve three years in the penitentiary.

This jurisdictional statement is submitted in order to establish to the satisfaction of this court that this court has jurisdiction of this appeal and that a substantial question is presented under the Constitution of the United States.

OPINION BELOW

The opinion of the court below in this matter is styled *Williams, et al v. State*, 237 Ark. 569, 375 S.W. 2d 375, and was

rendered by the Supreme Court of Arkansas, with one judge dissenting, on the 27th day of January 1964. Copies of these opinions are attached hereto as Appendix. Notice of Appeal to the Supreme Court of the United States was filed by the appellant on the 3rd day of June 1964, and amended on the 10th day of February 1965, in the Supreme Court of Arkansas, and the Attorney General of Arkansas was served with a copy of such notices on the same day each was filed. The time for docketing this case with the Clerk of this court was enlarged to include March 1, 1965, by Mr. Justice Johnson of the Arkansas Supreme Court (R. Vol. I, 100).

JURISDICTION

It is believed that 28 U.S.C. § 1257 (2) is the statutory provision which establishes the jurisdiction of the Supreme Court of the United States to hear this appeal. However, if appellant is in error in this respect, the attention of the Court is invited to 28 U.S.C. § 2103, which provides, in substance, that if this appeal is improvidently taken, it shall be acted on as a petition for writ of certiorari. *Williams v. Bruffy*, 96 U.S. 176, 183; *Railway Express Agency v. Virginia*, 282 U.S. 440; *Adamson v. California*, 332 U.S. 46; *Largent v. Texas*, 318 U.S. 418.

STATUTE INVOLVED

The state statute involved in this appeal is that which allows an accused person to be tried for a felony charge without being indicted by a grand jury. This is Amendment 21 to the Constitution of the State of Arkansas, and is found in 1 Ark. Stats. (1947) Annotated, pp. 223-224, and provides as follows:

> "All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the Prosecuting Attorney."

QUESTIONS PRESENTED

1. Was the provision requiring "indictment of a grand jury" in the Fifth Amendment to the Constitution of the United States violated when this appellant was tried in a State court for the felonies of burglary and grand larceny upon an information filed by the Prosecuting Attorney of the State, rather than upon an indictment rendered by the grand jury?

2. Was appellant's right under the Sixth Amendment to the Constitution of the United States, which provides for "the Assistance of Counsel", violated when he was interrogated after his arrest by the County Sheriff and the State Police without being advised by such officers of his right to remain silent and without being afforded an opportunity to consult an attorney?

3. Was appellant's right under the Fourth Amendment to the Constitution of the United States violated when he made no objection to the officers searching his premises after he was informed by them that they had obtained a valid search warrant to do so, when in fact such officers had no such search warrant?

4. Was appellant's right under the due process clause of the Fourteenth Amendment to the Constitution of the United States violated when the trial court permitted the same jury that heard all the other evidence to hear the alleged confessions of his co-defendants without the trial court instructing the jury in any manner concerning the voluntariness of such alleged confessions?

STATEMENT OF THE CASE

Appellant was arrested at his home in Faulkner County, Arkansas, at about 4:30 A.M., on February 19, 1962, and charged with the crimes of burglary and grand larceny, allegedly committed in Lonoke County, Arkansas. (R. Vol. II 82). He was not indicted by a grand jury, but tried and convicted upon an information filed by the Prosecuting Attorney.

On the 18th day of February 1962, prior to the arrest of appellant, State Police officers and the Sheriff of Lonoke County, arrested Marvin Stripling and Jess Holeman between 10:00 and 11:00 P.M. (R. Vol. II 78). These men were arrested and charged with the theft of some building materials in Lonoke County, Arkansas. These two men were arrested at their respective homes in Faulkner County, Arkansas, and taken to Lonoke County, Arkansas, some 50 or 60 miles away, and kept in custody by these officers. (R. Vol. II 76).

When these officers first came to Jess Holeman's house on the evening of February 18, 1962, they started to search it, but a search warrant was demanded of them. At that time they acknowledged that they did not have one, but returned in a short while and announced that they had obtained a search warrant. (R. Vol. II 78). Upon this assurance by the officers that they had a search warrant, they were permitted to search the Holeman house at that time, (R. Vol. II 79), and later the Holeman house trailer, (R. Vol. III 31), as well as the house owned by Turney, which had been occupied by Turney's father-in-law. (R. Vol. III 32).

Holeman and Stripling were taken to the City Police Department in Lonoke, Arkansas. When they arrived at this place, Stripling and Holeman were separated for questioning by these officers. One was taken to a back room for ques-

tioning, and the other was taken to a front room for questioning. (R. Vol. II 79).

Sergeant Leslie Caldwell of the State Police and Sheriff Warren Minton testified that Jess Holeman and Marvin Stripling confessed their part in the theft to them and implicated appellant. (R. Vol. II 82, 108).

There is considerable testimony in the record that these so called confessions were secured by medieval methods; that force and violence was used against their persons as well as constant questioning and interrogation from the time they were arrested at about 10:30 P.M. until they told the officers "what they wanted to know" at about 4:30 A.M., the following morning.

It was even admitted by the officers that they interrogated Stripling while his hands were handcuffed behind him (R. Vol. II 158), and that when they ceased the interrogation, Stripling's clothes were all bloody, and that a doctor had to be summoned in the wee hours of the morning to where Stripling was being interrogated to pack his nose in an effort to stop the bleeding. Sheriff Minton even admitted that he might have told Dr. Holmes, the physician who was called to the Sheriff's office to treat Stripling, that Stripling's "nose got bumped." (R. Vol. II, 147-148, 157-158, 112-113). There is much testimony in the record that Stripling was beaten by the officers while they interrogated him. (R. Vol. III 25, 28, 35, 44, 51-57, 66, 75-76; Vol. II 194-196, 197, 198-200). The officers denied any maltreatment of Stripling. The officers explained Stripling's bloody clothes and the calling of the doctor at about 2:30 A.M. to treat Stripling to the fact that Stripling was a "free bleeder".

After the officers had secured these "voluntary" confessions from Holeman and Stripling, which confessions impli-

cated appellant, they returned to Conway, the county seat of Faulkner County, and arrested the appellant at about 4:30 A.M. The officers took Holeman back to Conway from Lonoke with them, but left Stripling in Lonoke so that he might receive additional medical care if he needed it. The packing was taken out of Stripling's nose by the doctor two or three days later.

After these "confessions" were obtained, the officers went to appellant's home, got him out of bed and placed him under arrest. They then took appellant to a service station in Conway where they secured a trailer to attach to Holeman's truck before proceeding to a trailer house where they had been told the stolen items were located. State Police officer Caldwell's and Sheriff Minton's testimony was to the effect that Caldwell took appellant Turney to the back of the automobile in which they had been riding, which was then stopped at the service station, and that upon questioning, appellant Turney admitted his guilt to the theft. (R. Vol. II 82, 135).

After securing a trailer to attach to the truck, the police officers, Mr. Roy Nelson, the person whose property was stolen, appellant Turney, a Mr. Williams, who was also implicated by Holeman and Stripling in their "confessions," and Jess Holeman proceeded to Holeman's house trailer a short distance from Conway. The officers testified that appellant Turney admitted them to the house trailer, and appellant Turney confirms that he did so after the officers stated that they had search warrants. (R. Vol. III, 31, 40, 48). Most of the stolen property was recovered from this house trailer and the balance was recovered from a house owned by appellant, but which had been occupied by his father-in-law. The officers also searched this house without permission or consent, (R. Vol. III, 32), for, as appellant Turney testified, he had been informed by the officers that they had a search warrant which permitted them to do so. (R. Vol. III 31, 40, 48). A

water heater and sink were obtained as a result of the search of this house. (R. Vol. III 34). This constituted the balance of the stolen property, and this group then proceeded back to Lonoke.

On the return trip to Lonoke from Conway, appellant Turney, Sergeant Caldwell of the State Police, Mr. Nelson, Mr. Williams and Sheriff Minton of Lonoke County, were all in Sheriff Minton's car, Jess Holeman and Trooper Brashers returned to Lonoke in a truck driven by Jess Holeman, to which a trailer had been attached in order that the stolen property could be returned.

On the way back to Lonoke, Sheriff Minton testified that appellant Turney, when they passed the place from which the items had been stolen, showed them the drive way they had used and the fence they had cut to load the stolen items. Sheriff Minton also testified that appellant Turney showed them the house from which they had taken the property, and stated that they had "cased" the house on a previous trip to Lonoke.

After appellant Turney was taken into custody, he was tried before a petit jury in Lonoke County upon information filed by the Prosecuting Attorney. He has never been indicted by a grand jury. (R. Vol. I, 1). The record does not reflect that there was an arraignment or preliminary hearing.

HOW THE QUESTIONS WERE RAISED BELOW

The question of the validity of the State statute which permitted the defendant below to be tried without being indicted by a grand jury was brought to the attention of the trial court the day before the trial by motion, when the then counsel for appellant Turney questioned the validity of the information under the Federal Constitution. (R. Vol. III 82). At that point, the record reflects:

"MR. JONES:

> If the Court please I stand is this, the information upon which the state filed and the evidence was illegally secured in violation of the Federal Constitutional rights of a citizen, namely, Henry Turney by illegal searches and seizes and illegal arrest." (Sic).

The information of the Prosecuting Attorney, dated February 19, 1962. (R. Vol. I 1).

Counsel for appellant Turney filed a motion for a new trial on November 10, 1962, and paragraph 4 thereof specifically states that the trial court erred when it failed to quash the information upon which appellant Turney was tried. (R. Vol. I 48).

The Supreme Court of Arkansas makes no mention of this question in its opinion, other than to say that the court had examined "each and all" of the assignments of error and found no reversible error in the record. (R. Vol. I 79).

The question of "the assistance of counsel" was brought before the trial court by numerous objections to the introduction of testimony of police officers which they secured during the interrogation of the appellant Turney.

It was also specifically brought to the attention of the court in paragraph 9 of appellant's motion for a new trial, wherein it was stated "the trial court erred in permitting several witnesses for the State to testify over the objections of counsel that the tesimony and evidence secured by said witnesses were obtained in violation of the legal rights of the defendant, in violation of the Federal and State Constitutional rights of the defendant." (R. Vol. I 49).

The Supreme Court of Arkansas in its opinion made no mention of this question, other than in part V of its opinion

where the Court stated that it had examined all of the assignments of error and found no reversible error in the record. (R. Vol. I 79).

With regard to the unlawful search and seizure in violation of appellant's rights under the Fourth Amendment, this issue was raised in a motion filed on October 31, 1962. (R. Vol. I 45). Objections were made throughout the trial to the introduction of evidence obtained because such evidence was illegally obtained. Paragraph 4 of appellant's motion for a new trial also brought this question to the court's attention. (R. Vol. I 48). The Supreme Court of Arkansas in Part III of its opinion took up this question and held that appellant had waived his rights under the Fourth Amendment. (R. Vol. I 69).

With regard to the violation of appellant's rights under the due process clause of the Fourteenth Amendment respecting the introduction of the confession of his co-defendants below, this question was brought to the attention of the trial court in a motion to quash all evidence illegally obtained, filed on October 31, 1962, the day before the trial. Paragraph 2 of this motion asked the trial judge to suppress all evidence against defendant Turney which was illegally obtained in violation of his rights under "the Fourth, Fifth and Fourteenth Amendments to the United States Constitution". (R. Vol. I 45). Objection was also made to introduction of this illegally obtained evidence at the trial. (R. Vol. II 132). This question is also raised in defendant Turney's motion for a new trial.

The Supreme Court of Arkansas in part II of its opinion stated that there was no error in the trial judge's ruling to permit the jury to pass upon the voluntariness of such confessions.

THE QUESTIONS ARE SUBSTANTIAL

Each question raised in this appeal is substantial, for each question involves the fundamental rights of a human being, a citizen of the United States of America, and a person accused of a crime. The fundamental rights of the appellant in this case which have been violated were placed in the Constitution of the United States for the protection of this appellant and for the protection of all such persons who live under the laws of this country, regardless of their race, color or creed. This appellant has been sentenced to serve three years in the penitentiary. The court below has sentenced this appellant to forfeit his liberty and his freedom for this period of time, and to spend this time in involuntary servitude or slavery. This sentence also carries with it the forfeiture of the right to vote, to hold public office and a stigma that will follow him the balance of his life.

It is submitted that without the violation of appellant's fundamental rights, which are guaranteed to him under the Constitution of the United States, the conviction, which resulted in the requirement that this defendant forfeit three years of his life, could not have been had. The only thing more valuable or more substantial than freedom and liberty is life itself, and life itself without freedom and liberty is only an existence. Freedom and liberty of the individual are the cornerstones of the foundation of this country, and if these cornerstones are permitted to be eroded by the deprivation of the rights of single individuals, then our whole governmental structure is in danger and this country can not long endure.

The Fifth Amendment requires an individual to be indicted by a grand jury before he can be tried. This amendment, when originally adopted, concerned only trials by the Federal Government.

It is recognized that this Court has previously held that such requirement does not apply to trials for criminal offenses by the State courts. *Hurtado v. California,* 123 U.S. 131; *Gaines v. Washington,* 277 U.S. 81.

In *Gaines v. Washington, supra,* it was held that the State could proceed by information rather than by indictment by a grand jury, for

> "It has been well settled for years that the first ten amendments" to the Federal Constitution "apply only to the procedure and trial of causes in the federal courts and are not limitations upon those in state courts. *Spies v. Illinois,* 123 U.S. 131 and cases cited".

Since the decision in *Gaines,* this court, upon many occasions, has held that certain provisions of the first ten amendments *do apply* to the procedure and trial in State courts, and the announcement in *Gaines* and other cases to the contrary are no longer to be followed in this respect.

Since the adoption of Amendment 21 to the Arkansas Constitution, the persons who are brought to trial upon an information filed by the Prosecuting Attorney in the circuit court, have no right to be examined and committed by a magistrate, have no right to a certification of their probable guilt by any judge, judicial or quasi-judicial body, and have no right to the aid of counsel in the examination of witnesses in any preliminary hearing prior to trial.

Under the Arkansas procedure, when a person is taken into custody, and the Prosecuting Attorney files an information against him directly in the circuit court, as was done in the case at bar, the accused receives no preliminary hearing and there is no certification as to his probable guilt by any judicial officer or body. This procedure does not even qualify under the

majority opinion in *Hurtado v. California*, supra, as being "due process of law."

It is, however, submitteed that the dissenting opinion of Mr. Justice Harlan in *Hurtado* is a full and exhaustive analysis of the question which appellant now brings before the Court. It is also submitted that the more recent decisions of this court with regard to the Fourteenth Amendment making applicable to state court procedures and trials the safeguards which are set forth in the Fifth Amendment are in accord with Mr. Justice Harlan's dissent.

This court has held that certain provisions of the First, Fourth, Fifth, Sixth and other provisions of the first 10 Amendments are made applicable to the States by the Fourteenth Amendment, and the logic and reasoning of this Court which made other provisions of the Bill of Rights applicable to State court proceedings are also applicable to the right of an individual to be indicted by a grand jury before he can be brought to trial in a State court.

It is universally recognized that the provisions of the Fifth Amendment protect the fundamental rights of the individual, and this court, in its more recent decisions, has held that many provisions of this amendment apply to the states by virtue of the Fourteenth Amendment. The wording of the Fourteenth Amendment does not substantiate an argument that the Fourteenth Amendment only makes certain parts of the Fifth Amendment applicable to the States and leaves the States free to pursue a course contrary to the other provisions of the Fifth Amendment.

The reason and logic of this court, and the justice obtained by individuals before this court in the more recent decisions of this court which made the other provisions of the First, Fourth, Fifth and Sixth Amendments applicable to State

courts, would seem to require a review of all of the decisions of this court which hold that the grand jury indictment provision of the Fifth Amendment is not applicable to State courts.

It is respectfully submitted that the course charted by this court in *Mapp v. Ohio,* 367 U.S. 643, wherein the provisions of the Fourth Amendment against unlawful searches and seizures were made applicable to the State courts, and in *Gideon v. Wainwright,* 372 U.S. 335, and *Escobedo v. Illinois,* ..... U.S. ....., 12 L. ed. 2d 877, wherein "the Assistance of Counsel" provision of the Sixth Amendment was also made obligatory upon State courts, as well as other decisions of this court which also took a "second look" at previous decisions of this court because the states were not adequately protecting the fundamental rights of an accused, is the course to follow with regard to the applicability of the grand jury indictment provision in the Fifth Amendment.

It is, therefore, sincerely urged that the part of Amendment Twenty-One of the Constitution of Arkansas, which provides that a Prosecuting Attorney of the State of Arkansas may bring a defendant to trial for a criminal offense by filing an information against him without the defendant being indicted by a grand jury, is in violation of the Fifth Amendment to the Constitution of the United States, and therefore void.

With regard to the second question presented, i.e., the denial of "the Assistance of Counsel" in violation of the Sixth Amendment rights of appellant, it will be remembered that the appellant and his co-defendants had all been arrested and charged with burglary and grand larceny. They were in the custody of the officers who interrogated them. It was admitted by Sergeant Caldwell of the Criminal Investigation Division of the State Police that the defendants, while undergoing an accusatory investigation, were not advised that they did not have

to tell anything if they didn't want to. Sergeant Caldwell's testimony at the trial on this point is as follows: (R. Vol. II, 77).

"Q. Was there any force or threats used against the defendants?

A. No, sir.

Q. Any promise of reward?

A. No, sir.

Q. Were they beaten or mistreated?

A. No, sir.

Q. *Were they advised that they did not have to tell you anything if they didn't want to?*

A. *No, sir.*

Q. *They were not?*

A. *No, sir.*" (italics supplied)

With regard to seeing anybody during their interrogation, we invite the court's attention to the testimony at the trial of the father of Marvin Stripling, which is as follows: (R. Vol. II, 94).

"Q. I will ask you while you were in the city hall if you heard or saw your son at the city hall?

A. I heard him. I was in the first room to the right he was in another home (sic) room. I could hear his voice.

Q. What did he say?

A. I heard him say Henry Turney, that is what I heard them tell him to say, Henry Turney, Pop Williams and they would leave him alone. They were calling Marvin by his name, and I could hear him pleading,

telling them to please leave him alone. He told them to please quit.

Q. Could you hear anything else?

A. Yes, I could hear some metal signs (sic). It could have been handcuffs. He kept on moaning and groaning and begging *and I tried to get in where he was but the door was locked and they wouldn't let me see him. I went back to the door the second time and the state investigator came to the door and asked me what was going on and I ask him what was going on in there. He said nothing more than we are working your son over and we are going to give him* a good one and when we get through we will give you one you will never forget." (R. Vol. II, 195).

"Q. When did you see your boy next?

A. It was a couple days later at the Sheriff's office. He brought him down from the jail.

Q. Describe his condition when you saw him.

A. He had a bad swollen nose, two real dark eyes, his wrists were swollen and red.

Q. Was he in that condition the last time you saw him before he was arrested?

A. He was not."

Appellant did not, nor did any of his co-defendants, specifically ask for a lawyer. Under the above circumstances, however, it is obvious that such a request would have been as futile as were the pleas of Stripling for the officers to quit beating him. The record is replete with testimony concerning the manner in which Holeman and Stripling were abused by officers sworn to uphold the law and protect the rights of the in-

dividual. See Record, Vol. II, pp. 194-196, 197, 198, 200; Vol. III, pp. 25, 28, 35, 44, 51-57, 66, 75-76.

Under these circumstances, when the appellant was arrested and charged with burglary and grand larceny, and when it is admitted by the arresting and interrogating officer that the accused was not advised of his right to remain silent nor of his right to the "Assistance of Counsel", then appellant was effectively denied his right to the "Assistance of Counsel" even though he did not go through the useless motion of asking for a lawyer.

Appellant was gotten out of bed and arrested at about 4:30 in the morning. He was immediately separated from his children while his wife was in the hospital and taken to some service station in Conway where the officers were getting a trailer to attach to Holeman's truck to go to Holeman's trailer house to attempt to recover the allegedly stolen materials. It was at his service station that the officers testified appellant "confessed" to his part in the theft.

A short time later he was taken with Holeman to Holeman's trailer house. It was here that the officers entered Holeman's trailer house and then walked over to a house owned by appellant which they also entered and recovered the allegedly stolen materials. When these officers began their interrogation of him in an effort to get him to confess to the theft it was then and there that he at least should have been advised of his right to remain silent and of his right to consult a lawyer, for this right attaches whenever and accused's defenses or his constitutional rights may be lost or diminished because the guiding hand of counsel was not there to assist the accused!

The officers testified that they induced appellant to "confess", and that they also entered a house owned by him and a trailer house owned by his co-defendant Holeman.

This record does not show an arraignment or the pleas entered by the appellant, but from some of the testimony in the record it can be deduced that he was taken before the judge some three weeks after his arrest and permitted to enter a plea. The testimony of George Frank Williams reveals this, and it is as follows: (R. Vol. III, 24).

"Q. When was the first time a warrant of arrest was read to you?

A. After *I was in jail about three weeks, the Sheriff walked up to the cell and read a warrant to me, Jess Holeman, Marvin Stripling and Henry Turney for burglary and grand larceny, and that was on a Monday or Tuesday and he brought us on down here and we went before the judge to say whether we were guilty or not guilty. We said not guilty.* (italics supplied).

It is clear, however, that appellant and his co-defendants did not have counsel even at this stage of the proceedings. The trial judge should have seen that appellant had counsel when he was brought before him to plead. However, counsel at this point would have been placed in a position of locking the barn door after the horse had been stolen if the "activities" of these police officers are allowed to stand.

It is believed that this case, upon this point, is controlled by the decision of this court in the case of *Esbobedo v. Illinois*, ... U.S. ....., 12 L.ed.2d, 977; 84 S. Ct. 1758.

In *Escobedo*, the accused was being interrogated, but he was not being physically harmed. *Escobedo* was not advised of his right to remain silent. *Escobedo* requested a lawyer. Here appellant Turney was interrogated without being advised of his right to remain silent. He did not formally request a law-

yer, but an accused person is not required to go through a useless procedure to retain his rights.

This court, in *Escobedo*, stated:

"In *Gideon v. Wainwright*, 372 U.S. 335, 9 L ed 799, 83 S. Ct. 792, 93 ALR2d 733, we held that every person accused of a crime, whether state or federal is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' In re *Groban*, 352 U.S. 330, 344, 1 L ed 2d 376, 387, 77 S. Ct. 510 (Black, J., dissenting). 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial."' *Ex parte Sullivan*, 107 F. Supp 514, 517-518."

"It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.'

"*Watts v. Indiana*, 338 US 49, 59, 93 L ed 1801, 1809, 69 S Ct 1347 (Jackson J., concurring in part and dissenting in part). This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. *Massiah v. United States*, supra – US at —, 12 L ed 2d at 250; *Hamilton v. Alabama*, supra; *White v. Maryland*, supra. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor

of the right of the accused to be advised by his lawyer of his privilege against self-incrimination."

• • •

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsoved crime but has begun to focus on a particuar suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that ends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S., at 342, 9 L ed 2d at 804, 93 ALR2d 733, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

We invite the court's attention to the case of *People v. Dorado*, 40 Cal. Rptr. 264, 394 P.2d 952. In that case, the defendant, a prison inmate was taken into "custody" for police interrogation shortly after the killing of another prison inmate. During such interrogation, the defendant admitted his involvement in the killing; however, the defendant was not at any time during the interrogation informed of his right to counsel or of his right to remain silent. Neither did the defendant request counsel. At the trial the confession was held to be admissable evidence. On appeal to the Supreme Court of California, the attorneys for the convicted inmate raised the ruling of this court in *Escobedo*. The Supreme Court of California in applying the *Escobedo* rule in *People v. Dorado*, *supra*, stated:

"The question presented, then, is whether this failure of the accused to request counsel distinguishes the instant case from *Escobedo*. We conclude that it does not, that

the Constitutional right to counsel precludes the use of incriminating statements elicited by the police during an accusatory investigation unless that right is intelligently waived; that no waiver can be presumed if the investigating officers do not inform the suspect of his right to counsel or his right to remain silent."

"We find no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one: whether or not the *point of necessary protection for guidance of counsel has been reached.*" (emphasis added).

The point of necessary protection for guidance of counsel was reached in the case at bar when the accusatory investigation of appellant Turney began, and when the officers induced him to "confess" without advising him of his right to remain silent under the Fifth Amendment or advising him of his right to the "Assistance of Counsel" under the Sixth Amendment, and any such confession which these officers obtained was void, and the submission of such confession to the jury in the trial below of this appellant was error.

With reference to the third question presented, *i.e.*, the searching of appellant Turney's house and the trailer house of his co-defendant Holeman, it is submitted that the actions of the officers in so doing constituted an illegal search and seizure under the Fourth Amendment.

These officers first went to Holeman's home, and when they attempted to search it, they were asked if they had a search warrant. They admitted that they did not at that time. Shortly thereafter, these officers returned and showed a piece of paper and announced that they had obtained a search warrant. They then proceeded to search the Holeman home. This much is admitted by the officers. Testimony of Sergeant Caldwell on this matter is as follows: (R. Vol. II, 73).

"We later went to Conway and went to the residence of Mr. Holeman where we located the truck and asked permission to search his house, *and we were refused permission.* We radioed the Conway Police Department to obtain us a search warrant for the Holeman residence, and I personally went to get the warrant and met a city policeman who had the search warrant and brought it back and gave it to Sergeant Bill Mullenax who served the search warrant."

After these officers had searched the Holeman home, they arrested and interrogated Holeman and Stripling, and they later arrested Turney and took him with Holeman to Holeman's house trailer near Greenbrier, Arkansas. Appellant Turney owned a house near the house trailer of Holeman. Holeman's house trailer and the nearby house owned by appellant Turney were searched by these officers. In these two places the officers found and seized the material which was allegedly stolen and which was later used as evidence in the prosecution of appellant Turney.

Both appellant Turney and Holeman testified that they made no objections to the officers searching these places, for the officers informed them they had search warrants. The officers did not deny that they told Turney and Holeman they had search warrants, but testified that appellant Turney and Holeman gave them permission to search the house and house trailer!

It developed that the officers had no search warrant to search anything, and the Supreme Court of Arkansas so held by stating in its opinion as follows: (R. Vol. I, 70).

"We are convinced from the evidence that the search warrant so obtained was entirely void and worthless in every respect. It would serve no useful purpose to detail all of

> the evidence that impels us to such conclusion. The fact is we proceed in this case as though there had been no search warrant of any kind."

However, the Supreme Court of Arkansas stated that appellant Turney and Holeman waived their rights under the Fourth Amendment against illegal search and seizure. This holding was based solely on the testimony of the officers that appellant Turney and Holeman gave them permission to enter these places.

The uncontradicted testimony is that the officers stated to appellant Turney and Holeman at Turney's house and at Holeman's house trailer that they had search warrants. When these officers searched the Holeman home they admitted that they told the persons there that they had gotten a search warrant, and admittedly led all at the Holeman home to believe that they were conducting a legal search of such residence. It is certainly reasonable that appellant Turney and Holeman were told the same thing by these same officers that these officers had admitted telling before at the Holeman home in Conway, especially when such officers did not deny telling Holeman and appellant Turney that they had search warrants.

Courts will indulge every reasonable presumption against a waiver of fundamental constitutional rights, and will not presume acquiesence in the loss of fundamental rights. *Johnson v. Lerbst,* 304 U.S. 458; *Moore v. Michigan,* 355 U.S. 155; *Carnley v. Cochran,* 369 U.S. 506.

It is strongly urged that there was no waiver by appellant Turney or Holeman of their constitutional rights against unlawful searches and seizures. Before an accused can waive such fundamental rights he must be aware of such rights and must intelligently and understandingly waive them.

These officers, before they entered upon these premises of appellant Turney and his co-defendant Holeman, did not advise these accured that they, as officers, had no right to search such premises without a valid search warrant. Neither did these officers at that time, or any other time, tell appellant Turney and his co-defendant Holeman that they were entitled to advice of counsel about the officers searching such premises or anything else.

These officers lulled these accused into complacency and submission by telling them that they had search warrants, when in fact they did not have such warrants. Such an act of trickery and deceit can never be made a basis for the waiver of an accused's fundamental rights against unlawful searches and seizures. We submit the holding of the court below was in error, and that the trial court should have prohibited the State from using any of the materials or information obtained in such unlawful search and seizure in the prosecution of this appellant under the holding of this court in *Mapp v. Ohio*, 367 U.S. 463.

The final question raised by appellant Turney concerns the submission by the trial court of the so-called "confessions" of his co-defendants to the same jury which heard all the other evidence in the case, when such "confessions" implicated appellant Turney in the crime with which he was charged, particularly as the jury was not instructed in any manner concerning the voluntariness of such "confessions".

It is the contention of the appellant that when the trial court permitted the jury to hear the "confessions" of his co-defendants, as related by the police officers, when such "confessions" implicated him, without instructing the jury in any manner concerning the voluntariness of such confessions, his

rights under the due process clause of the Fourteenth Amendment were violated.

This case, upon this point, falls squarely within the holding of the Court in *Jackson v. Denno*, ___ U.S. ___ 12 L.Ed. 2d 908, 84 S. Ct. ___. In *Denno*, this Court stated:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers v. Richmond*, 365 U.S. 534, 5 L ed 2d 760, 81 S Ct 734, and even though there is ample evidence aside from the confession to support the conviction. *Malinski v. New York*, 324 U.S. 401, 89 L. ed. 1029, 64 S. Ct. 781; *Stroble v. California*, 343 U.S. 181, 96 L ed 872, 72 S Ct 499; *Payne v. Arkansas*, 356 U.S. 560, 2 L ed 2d 975, 78 S Ct. 844. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Rogers v. Richmond, supra.* In our view, the New York procedure employed in this case did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect *Jackson's* right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment. We therefore reverse the judgment below denying the writ of habeas corpus."

> "Under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary. But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge 'must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness.' *Stein v. New York*, 346

U.S. 156, 172, 97 L ed 1522, 1536, 73 S Ct 1077. If an issue of coercion is presented, the judge may not resolve conflicting evidence or arrive at this independent appraisal of the voluntariness of the confession, one way or the other. These matters he must leave to the jury."

• • •

". . . the New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other; . . ."

• • •

"It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' *Blackburn v. Alabama*, 361 US 199, 206-207, 4 L ed 2d 242, 248, 89 S Ct 274, and because of 'the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. . . ."

• • •

". . . The procedures used in the trial court to arrive at its conclusions on the coercion issue progressively take on added significance as the actual measure of the protection afforded a defendant under the Due Process Clause of the Fourteenth Amendment against the use of involuntary confessions. These procedures must, therefore, be fully adequate to insure a reliable and clear cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness is-

sue may depend. In our view, the New York procedure falls short of satisfying these constitutional requirements. *Stein v. New York* is overruled.

In the appendices to the opinion of Mr. Justice Black in *Denno* with regard to the States which follow the New York rule is found the following:

"II. *'New York' Rule*

If there is a factual conflict in the evidence as to voluntariness over which reasonable men could differ, the judge leaves the question of voluntariness to the jury.

ARKANSAS: *Monts v. State,* 233 Ark. 816, 823, 349 SW2d 350, 355 (1961); *Burton v. State,* 204 Ark. 548, 550-551, 163 SW2d 160, 162 (1943); *McClellan v. State,* 203 Ark. 386, 393-394, 156 SW2d 800, 803 (1941)."

From the above it will be seen that Arkansas follows the "New York" Rule which was declared unconstitutional in *Denno.*

The Supreme Court of Arkansas, in ruling on this point stated in its opinion as follows: (R. Vol. I, 68).

"In advance of the jury trial the appellants moved to exclude the confessions of Holeman and Stripling as illegally extorted and as obtained under force and duress. At the said advance hearing Holeman and Stripling testified as to the alleged beatings, etc. administered to them to force the confessions. The Trial Court held that the issue of the voluntariness of the confessions was for the jury; and at the trial the officers just as stoutly denied all such mistreatment of the prisoners and claimed that the confessions were voluntarily given. We cannot say that there was error in the ruling of the Trial Court in submitting to the jury the issue of the voluntariness of the confessions. See *Jones v. State,* 213 Ark. 863, 213 S.W. 2d 974; and *Moore v. State,* 229 Ark. 335, 315 S.W. 2d 907. The issue of the voluntariness of the confessions was submitted to the jury under instructions not here claimed to be erroneous."

As stated above, appellant filed a motion before the trial court the day before the trial, and asked the trial court to exclude the "confessions" of Holeman and Stripling. The motion of appellant Turney is found at pp. 36-37, 45-46 of Vol I of the Record. The hearing on such motion is found in Vol. III of the Record, pp. 1-86, and consists of the entire Volume III of the record.

Eight witnesses testified at this hearing, and the statement from the doctor who treated Stripling was also introduced by agreement. The entire evidence presented to the court at this hearing upon the voluntariness of these confessions was that these "confessions" were obtained by police brutality, and involuntarily made. The State produced not one word to uphold the legality of the "confessions" at this hearing. It is, of course, elementary that the burden is upon the State to prove that a confession is voluntary, and the mere suggestion by the defense that the confession is involuntary requires the State to come forward and meet its burden. Here the State wholly failed to do this. The State presented no witnesses or other evidence at this hearing. There was no issue of coercion at this hearing. The State produced no testimony or other evidence to even make an issue, and there were no facts presented upon which reasonable men could differ upon the influences to be drawn from undisputed facts. Yet, with all of this evidence before the trial judge of the beating, of the threatening and of the coercing of these two defendants, the trial judge overruled the motion to keep these "confessions" from the jury. (R. Vol. III, 83), and overruled the objections of the defendants when the "confessions" of the defendants were related to the jury by the police officers. (R. Vol. II, 132, 136).

From the above, it is clearly seen that the trial court did not even follow the "New York" Rule with regard to these

"confessions" which rule the decisions of the Arkansas Supreme Court has held to be proper in criminal cases in this State. The trial court didn't even submit the question of the voluntariness of the "confessions" to any jury. The trial court permitted the jury to hear the "confessions" along with all the other evidence in the case, and utterly failed to even mention to the jury that they should not consider the "confessions" if the jury found them to have been involuntary. The instructions of the trial court are found at pages numbered 220, 221 and 227 of Vol. II of the Record.

In the present case, appellant Turney and his co-defendants were actually deprived of their right to submit the question of the voluntariness of their "confessions" to anyone. The trial judge overruled the motion of defendants below to exclude the confessions although *all* the evidence before him upon that occasion established conclusively that the "confessions" were secured by force, threats and violence. The trial court held that the jury should decide the question of voluntariness of the "confessions" and then failed to even submit the question to the jury. This is apparently the "Lonoke County" Rule!

Appellant Turney's conviction was founded upon "confessions" not properly determined to be voluntary, for the procedure employed by the trial court in this instance did not afford a reliable determination of the voluntariness of the confessions offered in evidence at the trial, did not adequately protect appellant Turney's right to be free of a conviction based upon a coerced confession, and therefore such action cannot withstand constitutional attack under the due process clause of the Fourteenth Amendment. *Jackson v. Denno, supra.*

CONCLUSION

A reading of the record in this case will disclose that there was hardly a fundamental right of appellant Turney and his co-defendants which was not violated. These violations began with the arrest of appellant and his co-defendants, and continued through the trial court's instructions to the jury. The warrants of arrest under which these defendants were taken into custody and the affidavits upon which they were issued were not produced until the day before the trial even though they had been requested in the form of a Bill of Particulars. These warrants may be looked upon with a jaundiced eye, especially since the Prosecuting Attorney elected to file against these accused directly by information and caused a bench warrant to be issued after these men had been in jail for some time. The effort of the prosecution to uphold the search warrants the officers testified they secured, fell completely flat, the admissions of the officers that they did not advise the accused of their right to remain silent during an accusatory investigation is brazen, the refusal of the arresting officers to even let relatives confer with the accused Stripling — much less permit him to consult with counsel — is undenied, the maltreatment of Holeman and Stripling to obtain their "confessions" is cruel and inhuman, the failure to provide appellant Turney and his co-defendants with counsel even when they entered their pleas shows a complete indifference to the fundamental rights of the individual, and the failure to take the accused before a judicial officer as quickly as possible for arraignment reflects a complete disregard for the decisions of this court. The failure of the trial judge to exclude the "confessions" and other evidence illegally obtained upon the motion of defendants before the trial when *all* the evidence presented at the hearing on this motion unquestionably established that the "confessions" were involuntarily given and the searches and seizures were illegally made, reflects gross error.

The failure of the trial judge to even instruct the jury in any manner with regard to the voluntariness of the "confessions" after the trial judge permitted such to be related by the police officers to the same jury that heard all the other evidence in the case, when the voluntariness issue was again raised at the trial, constituted an almost unbelievable denial to appellant Turney of his fundamental rights.

However, the only unusual thing about this case, and the only thing that distinguishes it from other cases tried before the Circuit Court of Lonoke County, Arkansas, is the fact that the present case has at least been brought to the attention of this Honorable Court.

It is most sincerely urged and believed that because of the flagrant violation of appellant's fundamental constitutional rights that this court should, in the light of its previous decisions, require plenary consideration of this case with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

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Counsel for Appellant

APPENDIX

In The Supreme Court of Arkansas

WILLIAMS et al v. STATE

5074

Opinion delivered January 27, 1964.

1. CRIMINAL LAW – EVIDENCE – ADMISSIBILITY OF MATTERS CONNECTING DEFENDANTS WITH CRIME: – Testimony of events regarding a truck that took place 4 days prior to the alleged crime held admissible to show identification and complicity which would connect the owner and driver of the same truck with the crimes charged.

2. CRIMINAL LAW – CONFESSIONS – VOLUNTARINESS OF CONFESSIONS JURY QUESTIONS. – The issue of the voluntariness of the confessions was a question for the jury.

3. SEARCHES AND SEIZURES – VIOLATION OF CONSTITUTIONAL RIGHTS. – The constitutional guaranty against illegal searches and seizures does not prohibit a seizure without a search warrant where the articles sought are visible to anyone.

4. SEARCHES AND SEIZURES – VIOLATION OF CONSTITUTIONAL RIGHTS. – The constitutional provisions against unreasonable search and seizure afforded appellants no shield against articles in a truck parked in the open which articles were seen by the officers and taken.

5. SEARCHES AND SEIZURES – WAIVER OF CONSENT BY ACTIVE PARTICIPATION. – Defendants held to have waived their constitutional rights against unreasonable searches and seizures by actively participating in the search and assisting officers in loading the stolen articles into a truck for return to the owner.

6. CRIMINAL LAW – TRIAL – EXCLUSIONARY RULE. The court refused to exclude the sheriff from the court room at the hearing to suppress evidence. Held: The court committed no error since the sheriff was not called to testify at said hearing.

7. CRIMINAL LAW – TRIAL – EXCLUSIONARY RULE. – On the jury trial, the court at first refused to exclude the sheriff, but before any witness testified for either side in the case, the court excluded the sheriff. HELD: The court complied with Act 243 of 1955.

Appeal from Lonoke Circuit Court; W. J. Waggoner, Judge; affirmed.

Guy H. Jones and Francis T. Donovan, for appellant.

Bruce Bennett, Attorney General, by Jerry L. Patterson, Asst. Atty. General, for appellee.

Ed F. McFaddin, Associate Justice. The appellants are George Williams, Henry Turney, Jess Holeman, and Marvin Stripling. They were jointly charged, tried, and convicted of the crimes of burglary and grand larceny (Ark. Stat. Ann § 41-1001 and § 41-3907 [1947]; and they prosecute this appeal. Henry Turney filed a separate motion for new trial containing eleven assignments, and the other three appellants filed a joint motion for new trial containing fourteen assignments. In addition, Williams filed a separate pleading entitled, "Motion to Set Aside the Verdict as to George Frank Williams," and this pleading contained two assignments. The appellants have grouped all their assignments in eighteen points which are presented in their joint brief; and we will group the various points in suitable topic headings.

The information charged – and the State's evidence was designed to establish – that on the 18th of February, 1962, the four named appellants committed the crimes of burglary and grand larceny by feloniously, etc., breaking and entering the building of Roy Nelson, Jr., in Lonoke County, Arkansas, and taking away hot water tanks, tools, plumbing equipment, a rifle, a chain saw, and various other items in excess of $35.00. The appellants were arrested in Faulkner County on February 19, 1962; and the articles mentioned in the information were found and returned to the owner, Roy Nelson, Jr. The legality of alleged confessions and the way the officers obtained the property constitute some of the issues on this appeal, as well as other rulings in the course of the trial.

I. *Alleged Error In Admitting Testimony Relating to Matters Which Occurred Four Days Before The Crimes Were*

Alleged To Have Been Committed. State Police Officer Bill Brashers testified that on February 14, 1962, he arrested Marvin Stripling in Lonoke County for driving a car without a driver's license; that Stripling was driving a *white Ford pick-up truck;* and that Stripling said the truck belonged to Henry Turney, who lived in Faulkner County, Arkansas. Brashers testified that he checked out the license number and found that the truck was registered in Turney's name. Lonoke City Officer Bobby Joe Davis testified that Brashers brought Stripling to the Lonoke City Hall; that Stripling called Turney in Conway, who came to Lonoke and posted bond for Stripling; and that Stripling and Turney left in the said white Ford pick-up truck.

Objections were made to all of this testimony because it related to events four days before the crimes here charged; but this testimony was admissible as links designed to connect Turney and Stripling with the crimes here charged, since it was testified that the *said white Ford pick-up truck* was the same one that was used to haul away the articles from Nelson's house on February 18th and some of the stolen property was found in the same truck, as will subsequently be mentioned. The evidence was that Turney and Stripling were together in the car that was subsequently used to carry away the stolen articles; and this evidence was for the purpose of showing identification and complicity in the crimes here charged. The evidence detailed circumstances tending to connect the owner and driver of the truck with the crimes charged; so the appellants' objections on this point are without merit.

II. *The Appellants Claim That The Alleged Confessions By Stripling And Holeman Should Not Have Been Admitted In Evidence.* Roy Nelson testified that on Saturday, February 17th, he was constructing a dwelling seven miles from Lonoke and worked until about 8 P.M.; that when he went back to work on Sunday morning, February 18th, he discovered that someone had stolen all of the material supplies, parts tools, etc., from the house, including hot water heaters, bathroom fixtures, doors, plywood, etc.; that he could see from the vehicle tire tracks on the ground where the vehicle and attached trailer had entered and left the premises; and that he immediately contacted the Sheriff of Lonoke County and gave him a list of the articles stolen of a value in excess of $2,000.00. Sheriff Minton of Lonoke County testified that after observing the

tracks and other matters at the Nelson house, he suspected that the said *white Ford pick-up truck* which Stripling had been driving on February 14th was the vehicle that had been used in the commission of the burglary and grand larceny. Minton further testified that he and State Policeman Caldwell and Mullinix obtained from a Justice of the Peace in Lonoke County "John Doe" warrants for the arrest of the occupants of the said truck; that they went to Conway where the truck was located at the home of appellant Holeman; and that Stripling and Holeman were arrested and taken to Lonoke and incarcerated. The officers testified that Holeman and Stripling confessed their parts in the crimes.

In advance of the jury trial the appellants moved to exclude the confessions of Holeman and Stripling as illegally extorted and as obtained under force and duress. At the said advance hearing Holeman and Stripling testified as to the alleged beatings, etc. administered to them to force the confessions. The Trial Court held that the issue of the voluntariness of the confessions was for the jury; and at the trial the officers just as stoutly denied all such mistreatment of the prisoners and claimed that the confessions were voluntarily given. We cannot say that there was error in the ruling of the Trial Court in submitting to the jury the issue of the voluntariness of the confessions. See *Jones v. State*, 213 Ark. 863, 213 S.W. 2d 974; and *Moore v. State*, 229 Ark. 335, 315 S.W. 2d 907. The issue of the voluntariness of the confessions was submitted to the jury under instructions not here claimed to be erroneous. The question of whether the arrests were made by the State Police Officer, who could make arrests in Faulkner County, or by Sheriff Minton of Lonoke County, who could not make arrests in Faulkner County, was a fact issue; and no error is claimed as to the instruction on this matter.

III. *Appellants Claim A Violation Of Their Constitutional Rights*[1] *Against Unreasonable Search and Seizure.* This

[1]The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Art. 2, § 15 of the Arkansas Constitution provides:

"The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be vio-

point is most vigorously urged; and this is the most difficult question in the case. In advance of the jury trial the appellants presented their motion to suppress all evidence obtained by search and seizure and claimed that there were no valid search warrants. We recognize the holding of the Supreme Court of the United States in *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933. Under that case, evidence illegally obtained is not admissible in the State courts, regardless of the previous holding of the State courts on the point. The question here is whether the facts in this case bring it within the holding of *Mapp v. Ohio*.[2]

The testimony of Officer Caldwell detailed the course of events. The officers first arrested Holeman about 10 P.M. February 18th, and then arrested Stripling about thirty minutes later. When Holeman was arrested the officers started to search his house, but Mrs. Holeman refused them entrance until a search warrant could be shown her. The officers relayed the information back to Conway and claimed that they obtained a search warrant from the Municipal Court in Conway. We are convinced from the evidence that the said search warrant so obtained was entirely void and worthless in every respect. It would serve no useful purpose to detail all of the evidence that impels us to such conclusion. The fact is that we proceed in this case as though there had been no search warrant of any kind.

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lated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

[2]There are many annotations and law review articles concerning *Mapp v. Ohio*, which was decided June 19, 1961. We list only a few: Federal constitution as affecting admissibility of evidence obtained by illegal search and seizure," in 84 A.L.R. 2d 959; "Constitutional Law, Searches and Seizures," 15 Ark. Law Rev. 445; "Search and Seizure — The Exclusionary Rule and the Question of Standing," in 17 Ark. Law Rev. 176; "Mapp v. Ohio: Pandora's Problems for the Prosecut ," in 111 U. of Pa. Law Rev. 4; "Midnight Welfare Searches and the Social Se rity Act," in 72 Yale Law Journal 1347. Distinct from the Mapp case there a a number of other pertinent and informative articles, some of which are: ". propriety or lawfulness of seizure, not incident to arrest, of papers, documents, le rs, books and records not described in search warrant," in 79 A.L.R. 2d 100. 'Lawfulneess of nonconsensual search and seizure without warrant prior to a est," in 89 A.L.R. 2d 715; and "Search and Seizure: a No-man's Land in the Cr nal Law," in 49 Cal. Law Rev. 474. Some of our more recent cases involving s rch and seizure are: *Clubb v. State*, 203 Ark. 688, 326 S.W. 2d 816; *Stewart v. St te*, 233 Ark. 230, 343 S.W. 2d 568; *Burke v. State*, 235 Ark. (Adv. Sh.) 882, 362 S.W.2d 695; and *Gerard v. State*, ___ Ark. ___, ___ S.W.2d ___ (Opinion delivered November 26, 1963).

As aforesaid, Mrs. Holeman refused to allow a search of the house without a warrant. Armed with the said warrant the officers searched the Holeman house, but they found nothing; so such search, though illegal, obtained no evidence; and thus the search of the Holeman house passes out of the case. If any evidence had been obtained in the Holeman house we would promptly hold that such was illegally obtained.

There was the *white Ford pickup* parked in front of Holeman's house; and in the truck the officers found a hand drill, some tools, and other miscellaneous articles, all of which were later identified by Nelson as having been stolen from him. Were these articles obtained from the truck in violation of the appellants' constitutional rights against unreasonable search and seizure? There was no entry in a house, building, or dwelling, in order to see these articles in the truck parked out in the open. In 79 C.J.S. p. 881, "Searches and Seizures" § 66, cases from various jurisdictions are cited to sustain this text: "The constitutional provisions against unreasonable searches and seizures do not prohibit a search without a search warrant that does not constitute a tresspass. Hence the obtaining of information by the eye, where it is not aided by a trespass, does not constitute an unlawful search, since no search is involved, and the use of a flashlight or searchlight in aid of vision does not render it illegal. The constitutional guaranty does not prohibit a seizure without a search warrant where the articles sought are disclosed to any one of the senses . . ." Thus the articles in the truck, parked out in the open, were seen by the officers and taken; and the constitutional provisions against unreasonable search and seizure afford the appellants no shield against the articles that were in the truck and so seized.

After the confessions of Stripling and Holeman, as heretofore mentioned, warrants were obtained for the arrest of Williams and Turney; and in the early morning of February 19th they were arrested. According to the State's evidence, Turney told the officers that the stolen property was stored in a trailer near the settlement of Greenbrier in Faulkner County, several miles from Conway. Turney and Williams accompanied the officers to Greenbrier and pointed out the house trailer; and Turney unlocked the door to the trailer; and nearly all of the stolen property was found in the said house trailer. Turney and Williams assisted the officers in taking the articles out of the trailer and loading them into a truck so the articles could

be returned to Nelson, the owner. Were the appellants' constitutional protections against unreasonable search and seizure violated by the officers thus obtaining the articles from the trailer and detailing the evidence concerning same? Here, there was evidence, not only of waiver and consent, but also of active participation in the search; so there is no merit to the contention of the defendants that their rights against unreasonable search and seizure were violated insofar as concerns the articles in the trailer. In 79 C.J.S. p. 816 et seq., "Searches and Seizures" § 62, there is a discussion of waiver and consent; and the holdings from the various jurisdictions — including the United States Supreme Court — are summarized:

"The constitutional immunity from unreasonable searches and seizures may be waived, as by a voluntary invitation or consent to a search or seizure. Thus individuals may waive their immunity to illegal searches of their persons, possessions, or dwelling houses, as well as to the illegal search of their premises, places of business, and searches and seizures of books, papers, or records. Hence, one who has thus consented to a search cannot thereafter complain of irregularities in the search warrant, or question its sufficiency or the manner of its issuance, since an invitation or consent to the search dispenses with the necessity of a search warrant altogether."[3]

The State's evidence further showed that after the articles from the house trailer had been recovered, as above mentioned, the officers asked Turney if there were any more stolen articles; and Turney said there was a hot water tank and sink at the home of his father-in-law a short distance away from the house trailer. The party of Turney, Williams and the officers, proceeded to that house. Turney and Williams went inside and brought out the hot water tank and sink, which were placed in the truck to be returned to Nelson. The officers asked Turney if any other stolen property was in the house; and Turney turned on the light and told the officers they were welcome to look. They went in and found nothing except the connection to the sink, which was returned to Nelson with the other property.[4]

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[3]To the same general effect see 47 Am. Jur. p. 547, "Searches and Seizures" §71.

[4]To complete the narrative it is proper to add that all of the stolen property was returned to Nelson on February 19th and he identified and inventoried it and receipted the officers for it. Nelson also testified as to admissions in the nature of confessions that some of the appellants made to him; but it is unnecessary to detail all such testimony.

Were the appellants' constitutional protections against unreasonable search and seizure violated by the entrance into the home of the father-in-law and the obtaining of the hot water tank and sink and connection to the sink? According to the State's evidence, Turney and Williams voluntarily brought the hot water tank and sink from the house before the officers entered the house, so as to these articles there was no entry of the building by the officers. It is only as regards the connection to the sink that the officers entered the house of the father-in-law, who was not shown to have been present or anywhere in the vicinity or in any wise connected with any part of the case. Only the appellants are objecting to the actions of the officers. What we have said in regard to waiver and consent in the search of the trailer applies with equal force to the articles found in the house of Turney's father-in-law; so the defendants' constitutional rights against unreasonable search and seizure were not violated.

IV. *Refusal to Exclude Sheriff Minton From the Court Room.* The motions for new trial contain these two assignments:

"2. A motion to suppress all evidence illegally obtained, and motion to quash information based on said illegally obtained evidence, was filed by the defendants herein. A hearing on said motion was had preceding the trial. The hearing was on an afternoon the trial began the next morning. At the hearing the Rule was asked for, but the Court permitted the Sheriff of Lonoke County to stay in the Court Room and hear all of the defendants testify as to their illegal arrests, and the unlawful and illegal search and seizure of their premises. The Sheriff was also permitted to remain in the Courtroom the next morning, after both the State and the Defense had asked for the Rule. He remained there until the Jury was selected and during the opening statements of the Prosecuting Attorney and defense counsel, and the Court excluded him from the room at that point. This was error and in violation of Arkansas law which requires the exclusion of witnesses, when the rule is asked for.

"4. The trial court erred in refusing to exclude a witness for the State, Sheriff Warren Minton, upon the hearing of the motions to suppress evidence, after the rule was asked by de-

fendants, and then permitting Sheriff Warren Minton to testify in the trial of these cases."

These assignments relate to a ruling at the preliminary hearing on the motion to suppress the evidence, as well as to a ruling made at the time of the jury trial. We find no merit in these assignments. The hearing before the Court on the motion to suppress the evidence was on a day in advance of the jury trial, and, of course, before the jury was selected. At the said hearing to suppress the appellants asked for "the rule"; and this occurred:

"THE COURT: I will let you have the rule. What witness do you want to call? The sheriff will have to remain to wait on the court, so what witness do you want to call.

"MR. JONES: We object to any witness remaining in the court room.

"THE COURT: I will permit the sheriff to remain.

"MR. JONES: Note our exceptions to the presence of any witness that will testify.

"THE COURT: All witness that are going to testify please stand and raise your right hand and be sworn in. The rule has been asked for so you will have to retire from the court room. Who is your first witness, Mr. Jones?"

Sheriff Minton was not called as a witness by the State or the appellants at the said hearing on the motion to suppress the evidence, so he was not a witness at that hearing, and thus the appellants were not deprived of any of their rights by the fact that the Sheriff waited on the Court at the hearing on the motion to suppress the evidence.

The Court denied the motion to suppress, and the next day the case came for trial. A jury was selected, and the following occurred at the beginning of the trial:

"MR. JONES: Let the record show that the state has asked for the rule and witnesses for the State and the defendants are to retire to the witness rooms and Sheriff Minton will be a material witness in this cause and he is to remain in the court room after the rule has been asked for and let the record now reflect at this time we enter our objections on behalf of

the defendants for the witness, Sheriff Minton to remain in the court room.

"THE COURT: Lonoke County has only one sheriff and this court has got to have a sheriff to wait on it, to wait on the Court in the calling of witnesses and to keep order in the Court and your motion will be overruled an you may save your exceptions.

"MR. JONES: Note our exceptions.

"MR. DONOVAN: Note the defendants' exceptions."

Then when Sheriff Minton was called as a witness the defendants objected to the Court allowing him to testify, and the following occurred:

"THE COURT: Let the record show I first overruled the motion because the Court stated that it needed some officer to wait on the court, but before any testimony was taken I changed that ruling ad Mr. Minton was excluded from the Court room and he heard no testimony from any of the witnesses and the other testimony that he did hear was before the court in the absence of the jury and the jury did not hear any of that testimony as it was before the Court. I will overrule your motion.

"MR. DONOVAN: Note our exceptions."

The appellants insist that under Act No. 243 of 1955 they had an absolute right to have Sheriff Minton excluded from the trial. Said Act reads:

"AN ACT to Amend Arkansas Statute (1947) § 28-702 Authorizing the Exclusion of Witnesses in Criminal Actions.

"Be It Enacted by the General Assembly of the State of Arkansas:

"SECTION 1. If the accused or his attorney requests it, the judge shall exclude from the court room any witness, including but not limited to the officers of the court, officers of

the law and experts not at the time under examination, so that they may not hear the testimony of other winesses."[5]

It is fairly evidence from the statement made by the Trial Judge, as last quoted above, that shortly after the ruling that Sheriff Minton could remain in the court room the attention of the Court was called to the said Act No. 243 of 1955, and the Court then immediately excluded Sheriff Minton from the court room so that the Sheriff heard none of the testimony. We therefore see that the Sheriff was excluded and heard none of the testimony, and so no error was committed prejudicial to the appellants.

V. *Other Rulings Claimed As Error.* The appellants assigned as error a number of other rulings of the Trial Court, such as: alleged prejudicial remarks of the Prosecuting Attorney in the argument; refusal to exclude testimony of the witness Bryant; allowing certain officials to testify; remarks of the Trial Judge; and other rulings. To list and discuss all of these assignments would unduly extend this Opinion and serve no useful purpose. It is sufficient to say that we have examined each and all of the assignments and find no reversible error shown in the record.

Affirmed.

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[5]Since we have not heretofore discussed Act No. 243 of 1955, it is proper to point out:

(a) That the Act is carried into Ark. Stats. as § 43-2021 (Supp. 1963).

(b) The Act does not purport to amend Ark. Stat. Ann. § 43-615 (1947) which relates to exclusion of witnesses at preliminary hearings.

(c) The caption of the Act No. 243 purports to apply only to criminal trials.

(d) Even though Ark. Stat. Ann. § 28-702 (Repl. 1962) is a part of the Code of *Civil* Procedure, nevertheless Ark. Stat. Ann. § 43-2004 (1947) provides that the rules of civil procedure apply generally in trial of criminal cases.

(e) Whether the language in *Clubb v. State*, 230 Ark. 688, 326 S.W. 2d 816, was a comment on the effect of Act No. 243 of 1955 is not necessary for decision here.

(f) Generally, see 8 Ark. Law Review 506 and 9 Ark. Law Review 402.

DISSENTING OPINION

JIM JOHNSON, Associate Justice. I do not agree with the majority opinion. In my view the majority has, this day effectively emasculated Act 243 of 1955 [Ark. State Ann. § 43-2021 (Supp. 1963)].

From the time of the adoption of the Civil Code until the year 1955, the applicable law on invoking the "Rule" to exclude witnesses from the court room in criminal cases was found in § 658 of the Civil Code [Ark. Stat. Ann. § 28-702 (Repl. 1962)], which reads as follows:

"If either party requires it, the judge *may* exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witness." [Emphasis ours.]

Under § 658 of the Civil Code, this court held on numerous occasions that the matter of putting any witness under the "Rule" addressed itself to the sound discretion of the trial court. These decisions were sound, in that the statute in question employed the word "may" and certainly the employment of "may" clearly left the matter to the sound discretion of the trial judge. Under the cited section of the Civil Code, this court also held that it was not an abuse of discretion to refuse to place officers of the law under the "Rule". Again, because of the peculiar terminology of the statute in question, those decisions were sound.

However, in 1955, with the enactment of Act 243, the Legislature radically changed the law with reference to the exclusion of witnesses under the "Rule" in criminal cases. Section 1 of that Act reads as follows:

"If the accused or his attorney requests it, the judge *shall* exclude from the court room any witness, including *but not limited to the officers of the court, officers of the law* and experts not at the time under examination, so that they may not hear the testimony of other witnesses. [Emphasis ours.]

By the use of the word "shall" in the quoted statute, the Legislature unmistakably declared that the matter of whether witnesses would or would not be excluded from the court room no longer was left to the discretion of the trial court, but that

upon demand of the defendant or his counsel, such exclusion became mandatory.

At the beginning of the trial of this case, the appellant sought to suppress certain evidence on the grounds (a) that some of the evidence was obtained by illegal search and seizure, and (b) that certain confessions had been obtained in violation of the defendants' constitutional rights. A lengthy hearing was held on this motion, and at the beginning of this hearing the appellants unequivocally demanded that Sheriff Minton be excluded from the hearing. They duly saved their exceptions to the court's refusal to honor their demand. In the course of that hearing there was testimony from a number of witnesses, including the testimony of some of the appellants. Their testimony was concerned with the circumstances under which certain searches were conducted and seizures made, as well as the circumstances under which certain alleged confessions were obtained. While the State called no witnesses in this hearing, a large part of the State's case in chief, as well as that of the defendants, was concerned with whether any evidence had been obtained as the result of illegal searches and seizures, or any confession obtained by compulsion. Thus, the sheriff, who was to be a principal State witness, was enabled to learn in great detail the contentions of the defendants with reference to those vital issues.

The basic error in refusing to exclude Sheriff Minton and allowing him to hear the testimony in question is because it was in direct violation of Act 243 of 1955. This Act was undoubtedly passed to prevent perjury and, more importantly, the opportunity to commit perjury. The policy of the law is to remove the opportunity for perjury and thereby to completely eliminate any question as to whether any witness altered his testimony to meet that of any other witness. There is no satisfactory way to determine what any particular individual may do when armed with knowledge of what other witnesses say. The primary purpose of the "Rule" is to prevent collusive testimony and to elicit the truth from each witness by preventing his being influenced by the testimony of others.

It is not the province of this court or of the trial court to determine questions of policy upon which the Legislature has

spoken in such unmistakable terms when there is a valid ground for the exercise of legislative power. This court has not attempted to say that the statute in question is unconstitutional. Obviously, such is not the case. It is impossible to say whether the trial court's action in allowing the officer of the law to hear the testimony did the appellants any actual damage. However, a substantial right of the appellants was violated. It will not do to speculate as to whether they were or were not prejudiced thereby. If it be said that the sheriff in this case was an honorable man who would not stoop to perjury, my reply is that given by this court on several previous occasions: The answer is, "twill be recorded for a precedent and many an error by the same example will rush into the state. It cannot be."

The efficacy of the "Rule" as an instrumentality designed to ferret out truth was first demonstrated in the Apocryphal Scriptures in the story of Susanna and the Elders, where Daniel was impelled by the Lord to separate the lustful elders as they testified in pursuit of their iniquitous desire to besmirch the honor and take the life of a virtuous woman. The result was the complete exoneration of Susanna . From that day until this, the "Rule" has been one of the brightest stars in the crown of justice. I could never vote for its abrogation. For the reason stated, I respectfully dissent.